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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

—v.—

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae*.

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the brief.

While this Court, in *Time, Inc.* v. *Hill*, U.S. 17 L. Ed. 2d 456 (1967), discussed the New York Court of

Appeals decision in the instant case, there still remain unanswered substantial questions concerning the reach of the statute and the limitations imposed by the First and Fourteenth Amendments upon its application.

These questions involve potential restraints on freedom of speech and press in major areas of public interest. If the scope of First Amendment protection against these restraints is not clarified and made more precise (or, indeed, if these questions are left unanswered), authors of biography, history, social commentary, and political analysis and criticism will continue to be exposed to the threat of "right of privacy" suits designed to suppress books. The restraints imposed by the New York Court of Appeals opinions here and in *Time, Inc.* are not limited to novels or plays; they apply to all forms of writing. Indeed, despite the confusing label "fictionalization" used by the New York opinions, appellant's book is clearly not a novel, but a biography (albeit to some degree inaccurate). Should these questions remain unanswered, the inevitable result will be a stifling self-censorship, imposed by the unwillingness of authors and publishers to spend large sums to defend such actions, the fear of damage awards, and the possibility of heavy losses should a court enjoin continued sale of a work —pending or following the trial.

For example, the New York decision might bar much political and social criticism, particularly satire, parody and cartoons. In these literary forms, public figures are depicted in "fictionalized" situations, i.e., they are portrayed or described as doing things they never actually did; and uttering dialogue the author wrote to communicate their expressions and thoughts ("invented dialogue"). Under

the New York rule political cartoons, satire and parody may well be deemed "fictionalization" and therefore punished by an award for damages, and restrained by an injunction.

Similarly, under the New York rule, authors and publishers face the risk of suit if a biography or current history employs any so-called "invented dialogue."

Among the other questions still unanswered: (1) whether New York may, in any event, employ the remedy of injunction to restrain publication of a book or magazine which contains material that goes beyond the boundary of First Amendment protection this Court established in its *Time, Inc.* decision; and (2) whether the same tests apply to private persons who are involuntarily exposed to public view (the Hill Family) and individuals who, by their own voluntary activities, become public figures (Mr. Spahn).

Counsel for the Authors League has been advised by Appellant's attorney that he has no objection to the filing of the within brief *amicus curiae*. Counsel for Appellee has advised the League's attorney that he does object to the filing of the brief.

Because the Authors League of America believes that the still unanswered questions in this area pose serious threats to freedom of speech and press, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc.

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., *AMICUS CURIAE*

Introductory Statement

Mr. Justice Brennan's opinion in *Time, Inc.* v. *Hill*, U.S. , 17 L. Ed. 2d 456 (1967), leaves no doubt that the biography of a public figure like Mr. Spahn is a report on a matter of public interest and therefore protected by the First Amendment against liability under the New York statute (Civil Rights Law Secs. 50, 51)—unless it transcends the boundary lines established by this Court in *Time, Inc.* Since the New York courts did not consider these criteria, this Court should note probable jurisdiction to reverse the judgment and establish beyond doubt that the *Time, Inc.* rule applies to so-called "unauthorized" biographies of public figures.

But beyond this, we respectfully submit that the Court should take jurisdiction to resolve basic First Amendment questions, posed by the decision below, which were not disposed of by *Time, Inc.* v. *Hill, supra.*

The Questions Presented

We respectfully submit that this appeal poses the following questions:

1. With respect to the *Time, Inc.* test:

   (a) Is the author of false statements (concerning a matter of public interest) which are not "material and substantial falsification" protected by the First Amendment, without regard to whether published with knowledge of their falsity or in reckless disregard of the truth?

   (b) Is this Court's test of "material and substantial falsification" different from the New York tests: "fictionalization" or "minor errors in an otherwise accurate (report)"?

2. Is "invented dialogue" which does not amount to "material and substantial falsification" protected by the First Amendment under the *Time, Inc.* test?

3. May a state use the remedy of injunction to enforce its right of privacy laws?

4. If "invented dialogue" or other inaccuracies derive from an author's reliance on published secondary sources, can such reliance constitute "reckless disregard of the truth"?

5. Can a state prevent publication of non-defamatory statements concerning a public figure, truthful or not, which do not intrude upon intimate details of his private life?

6. Are the New York Statute, and the decisions which expanded its scope to apply here, so vague and ambiguous that they violate the First and Fourteenth Amendments?

POINT I

(a) Material and substantial falsification is the threshold test under the *Time, Inc.* rule.

(b) That test is not the same as "minor errors in an otherwise accurate (report)" or "fictionalization."

(a) We submit that the decision in *Time, Inc.* v. *Hill*, U.S. , 17 L. Ed. 2d 456 (1967), requires as a first, and threshold, Constitutional test that, to be actionable, false statements must constitute "material and substantial falsification" (17 L. Ed. 2d, at 466); and if they do not, then they cannot be punished under the New York statute regardless of whether they were made with knowledge of their falsity or in reckless disregard of the truth. If a public figure, seeking to restrain a book about himself, wishes to use the process of restraint inherent in a right of privacy suit—it would require no great skill in pleading by his attorney to create "issues of fact" concerning the author's alleged wilfulness or reckless disregard of the truth on innumerable statements which the plaintiff might claim to be false. The author and publisher could thus be put to the costly burden of proving—in pretrial proceedings and at the trial—that every challenged statement was not knowingly false or made recklessly. This threat, and the danger of failing to satisfy the jury as to the *bona fides* of each statement constitute potent deterrents to free speech.

We respectfully submit that the restrictive effects of such a process constitute too great a threat to First Amendment freedoms to be tolerated in connection with statements which are not "material and substantial falsifications";

and that authors and publishers should not be subjected to such a burden, and the consequent restraints it produces, with respect to statements that are not "material and substantial falsifications"—regardless of whether they were made knowingly or in reckless disregard of the truth.

(b) We respectfully submit that this Court's test of "material and substantial falsification" provides far greater First Amendment protection than the criteria applied below—and that this should be made clear.

The Court of Appeals only conceded that "minor errors in an otherwise accurate" report did not prove "fictionalization." This allows scant margin for error; and only a grudging and small portion of the precious "breathing space" for freedom of expression afforded by the Constitutional protection for erroneous statements. (*Time Inc.* v. *Hill*, 17 L. Ed. 2d, at p. 467.) "Minor errors in an otherwise accurate [report]" is far more restrictive and limiting than the *Time, Inc.* test. "Material" means "Of solid or weighty character; substantial; of consequence; not to be dispensed with; important" (Webster's NEW INTERNATIONAL DICTIONARY, Second Edition). The alleged misstatements in defendant's book can hardly be deemed "material" in this sense (see Appendix F—Appellants' brief). On the contrary, the more appropriate label for this miscellany of minor error and petty inaccuracy would be—"trivial".

The ambiguous phrases employed by the New York courts will inevitably result in imposing liability on books which do not, taken as a whole, involve the substantial degree of falsification which could possibly justify denial of

First Amendment protection. "Fictionalization" which the Court of Appeals said was "at the heart" of the cases, is a particularly confusing guideline to use in determining this critical Constitutional issue. The question is not whether the First Amendment permits an author to name and use the plaintiff as a character in a novel about baseball. This was not done; and this is not the issue in this case. Appellants' book is patently not a novel or a play. It is a biography of plaintiff; it deals with him and real people involved in his life (it has no fictitious characters); it deals with events in his life (it does not have an artificial plot). The book's factual errors and "invented dialogue" may make it "inaccurate"; but they do not make it a novel.

"Fictionalization," in this context, is a catchword which begs the fundamental question—whether the book's inaccuracies, including its "invented dialogue," amount to "material and substantial falsification" so that if the author made such statements knowingly or recklessly, he can be penalized by an award for damages (even though —it should be added—he did not commit defamation and did not invade the plaintiff's "right of privacy" in the Brandeis-Warren sense of the phrase.)

We submit that a reading of the book—pursuant to this Court's policy that the question of whether it be denied First Amendment protection involved a mixed question of law and fact (*Jacobellis* v. *Ohio*, 378 U.S. 184 (1964))—will disclose that the inaccuracies complained of do not constitute "material and substantial falsification".

POINT II.

Invented dialogue which does not amount to "material and substantial falsification" should not be denied protection of the First Amendment.

The New York opinions seem to suggest the use of "invented dialogue" in a work of non-fiction *per se* subjects it to liability under the New York statute. We believe that the Court should make it clear that this narrative technique cannot *per se* be denied protection under the First Amendment. An author may report someone's conversation in the third person; or may seek to convey the substance of it by casting it in the first person and employing quotation marks. In either form, his report of the conversation may be accurate, or partially accurate, or completely false. The use of dialogue has frequently been employed in biographies, histories, and other works of non-fiction and reportage; and has never been limited to reporting only conversations which the author himself heard or which were reported to him *in haec verba* by "ear witnesses."

We respectfully submit that under the *Time, Inc.* test, the issue is whether reports of conversations—whether in narrative or dialogue form—amount to "material and substantial falsification." If they do not, they should be protected under the First Amendment. We urge that the Court make clear that "manufactured dialogue" is protected by the First Amendment unless it transcends the *Time, Inc.* test. Unless this be the rule, constitutional protection would also be denied to other forms of literary and artistic comment upon public figures involved in political and social issues. Criticism, satire and parody frequently employ "manufactured dialogue." It is obvious that such

forms of expression are protected by the First Amendment. (And, they cannot be distinguished, on Constitutional grounds, from a book, such as Appellants.) For example:

> . . . AND THEN I TOLD THE PRESIDENT, by Art Buchwald (G. Putnam & Sons, New York 1965) is a collection of the author's newspaper columns. Some of these are devoted almost exclusively to repeating, verbatim, "conversations" between President Johnson, Barry Goldwater and Hubert Humphrey (p. 8), President Johnson and Secretary McNamara (p. 8), President Johnson at a press conference (p. 25), President Johnson and Robert Kennedy (p. 39), and Mr. Kennedy and Stephen Smith (p. 55). None of these conversations ever took place; all the incidents were "imaginary"; the dialogue was "manufactured"; the treatment of the living subjects was not always flattering.
>
> STRAIGHT HERBLOCK, by Herbert Block (Simon & Schuster, New York 1964) contains a cartoon (p. 177) showing a recent national political candidate, clearly identified by the accurate drawing of his features (and his initials on his attaché case) speaking to a mother and three children, dressed in rags and huddled on the steps of a shanty: "If you had any initiative, you'd go out and inherit a department store." As is the case with most of the cartoons in the book, and many cartoons about public figures in sports, business, religion, politics, and other fields, the incident was "imaginary," and the dialogue "manufactured."

POINT III

A state may not use the remedy of injunction to punish a violation of the right-of-privacy law.

Under the New York statute, the Court may enjoin a publication or further sale of a book which violates the right-of-privacy statute. We respectfully submit that this remedy is unconstitutional. In *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296, the Court said:

> "We are in an area where, as *Shelton* v. *Tucker*, 364 U.S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '. . . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

See also *Freedman* v. *Maryland*, 380 U.S. 51.

We respectfully submit that even to the extent that a State may redress violations of the "right of privacy", that limited purpose cannot constitutionally be achieved by employing the remedy of injunction. This is too great a restraint to impose upon the right of freedom of expression. In this connection it is significant that courts have traditionally refused to enjoin the publication of a libel, and confined the remedy to an award of damages.

POINT IV

An author's use of material derived from public secondary sources should not expose him to liability under a right-of-privacy statute.

If authors were compelled to write only on the basis of first-hand knowledge of a person or of events, production of biography, history and other forms of socially important works of non-fiction would be drastically curtailed. The author of a biography or history has neither the time nor the means to verify the accuracy of all secondary sources he uses; and it would be socially undesirable to prevent him from being free to rely on those sources. However, if he is only able to do so on penalty of right-of-privacy liability—should the sources prove inaccurate, and he be unable to convince a jury that he was not wilful or reckless—then research, writing and publishing will be seriously curtailed.

It must be remembered that this whole area of liability contains no visible danger signals: at least, an author or his publisher has some warning that particular and comparatively limited types of statements may constitute libel if they are not true. But almost any conceivable statement, if not true, would under the New York rule be an invasion of privacy.

We respectfully urge that the Court make it clear that an author is entitled to use published, and other reputable, secondary sources; and that his reliance upon them precludes a finding of wilful falsity or reckless disregard of the truth.

POINT V

Publication of non-defamatory statements concerning "voluntary" public figures, which do not intrude upon their private lives, are entitled to full First Amendment protection.

In *Time, Inc.* v. *Hill,* the Court the allegedly false report concerned private citizens whose private life became, without their choice, a matter of public interest. An entirely different question is presented in this case. As the New York Court of Appeals acknowledged, a person who becomes a public figure through his own voluntary efforts is "substantially without a right of privacy."

We respectfully submit that the New York courts, however, have drastically departed from this concept in holding that the author of an unauthorized biography of such a public figure loses his Constitutional protection because of errors or misstatements—even though it does not expose to public view truly intimate details of his private life.

In *Time, Inc.* v. *Hill,* this Court said:

> "But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us." (17 L. Ed. 2d at p. 469).

We respectfully submit the question is posed in this case; and that the Court should consider whether a different standard should apply—one that places less restraint on freedom of expression in a book concerning a "voluntary" public figure.

POINT VI

The ambiguity of the New York statute and decisions.

In *Winters* v. *New York*, 333 U.S. 507, this Court held that

> "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." (pp. 509-510)

We respectfully submit that both the New York statute, and the New York decisions which expanded it are so vague, broad and indefinite in both respects that they violate the constitutional rights of authors and publishers and are therefore invalid under the *Winters* doctrine.

If liability were predicated on the statute alone, it would be unconstitutional under *Winters* v. *New York* (see also *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 417); *People* v. *Kahan*, 15 N. Y. 2d 311). Actually, the right of action enforced here was engrafted onto the statute by a series of decisions. We respectfully submit that *Time, Inc.* v. *Hill* did not answer two questions involving this process of judicial legislation: (1) whether it is permissible under the First and Fourteenth Amendments and (2) whether the opinions which created the new restraints are themselves so vague and ambiguous as to be unconstitutional under *Winters* v. *New York*.

This Court has previously indicated the obvious dangers to freedom of speech and press inherent in such a process

of piecemeal, case by case, definition. If authors and publishers must write and publish in fear that the right-of-privacy doctrine will receive new interpretations and developments, then books about public figures will steer far wide of the danger zone. (Cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 787 (1964).) We submit that the inherent and inescapable restrictive effect of a process of judicial amendment and extension of a statute imposing restrains on freedom of expression are totally incompatible with the First and Fourteenth Amendments. If any restraints in this area can be reconciled with the First Amendment, we submit that the only process by which they can be created is by legislation. Then, authors and publishers can at least be certain that the next decision will not extend the restraints beyond the limits set in the statute; they will at least know that they can write and publish within those limits; and they will at least be able to challenge the statute, if *on its face* it encroaches on areas protected by the First Amendment.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae